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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RENE FUENTES, Defendant and Appellant.	F053785 (Super. Ct. No. BF118256) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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In connection with two drive-by shootings against rival gang members, defendant Rene Fuentes was convicted of one first degree murder, three attempted murders, and

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, and V of the Discussion.

related charges. His prison sentence includes a life term without the possibility of parole. On appeal, he claims the court gave several incorrect jury instructions. He also makes two constitutional arguments claiming his sentence is erroneous. He acknowledges that the latter arguments are precluded by controlling California authority and asserts them now to preserve them for later review.

We hold in the published portion of our opinion that there is no conflict between Judicial Council of California, Criminal Jury Instruction (CALCRIM) pattern instructions on motive and the mental-state elements of the substantive offense of criminal-street-gang participation or the sentence-enhancement and special-circumstance provisions related to criminal street gangs.

The judgment is affirmed.

FACTUAL AND PROCEDURAL HISTORIES

Fuentes, who was 18 years old at the time of the shootings, was known to the Bakersfield police as a member of Varrio Rexland Park (VRP), a Sureño criminal street gang he joined when he was 14. He had the letters "VRP" tattooed across his abdomen, the number 13 on a finger, and three dots near his left eye. The number 13 referred to the 13th letter of the alphabet, M, which stands for Mexican Mafia, the prison gang organization under which Sureño gangs operate. The three dots were also a Sureño symbol. Fuentes claimed VRP membership when he was arrested for the current offenses and during other encounters with the police.

The victims of the shootings were Margarito Perez, Jaime Calderon, Jose Guzman, and the deceased, Jesus Arredondo. Margarito Perez was a member of Cycos 13, a gang based in Los Angeles with about 20 members in and around Bakersfield. Though both are Sureño gangs, VRP and Cycos 13 are rivals. Perez lived with his mother in territory claimed by VRP, two blocks away from Fuentes's house. Perez knew Fuentes from the neighborhood. Calderon was Perez's half-brother. Guzman and Arredondo were friends of Perez.

Episodes of gang-related tension involving Fuentes and some of the victims took place prior to the shootings. Someone fired shots at Guzman's house. Guzman fought with a VRP member known as Silent; Silent pulled a knife. Fuentes came to Guzman's house to say Guzman should get out of the neighborhood. Guzman went to see Fuentes to say he did not want trouble; he believed Fuentes gave his word to cease hostilities, but the hostilities continued. A group of VRP members confronted Calderon, thinking he was Perez; one of the members pulled a gun. Someone painted Cycos 13 graffiti on the sidewalk in front of Fuentes's house. Someone else crossed it out.

The first shooting took place on June 14, 2006. Perez was in his front yard with his 18-month-old nephew. A brown Mitsubishi Galant drove by. Fuentes, wearing a bandanna and a blue Kansas City Royals cap (bearing the legend K.C.) to signify his membership in a Kern County Sureño gang, fired a gun from the front passenger seat. Calderon's car, parked in front of the house, was hit by a bullet. Perez grabbed the child and ran inside.

The second shooting happened on June 24, 2006, in the parking lot of a shopping center at the corner of Ming Avenue and Stine Road. Perez, Calderon, Guzman, and Arredondo drove there together after dark. They got out and watched cars drive around the parking lot. They brought beer to drink and hoped to meet girls.

At about the same time, Fuentes arrived at the parking lot as a passenger in a green Lexus belonging to the parents of Fabian Lopez, a member of a Sureño gang called Bakers 13. Fuentes, Lopez, and Fuentes's cousin Silviero, a VRP member known as Gumby, were in the car. Gumby was driving. As they drove around the parking lot, Fuentes saw Perez's group and became agitated. "[T]here them fools are," he said. "[W]here at," Gumby replied. Lopez said, "[L]et's take off." As Gumby steered the car out of the parking lot onto Ming Avenue, they again passed Perez's group. Lopez then heard shots coming from the back seat, behind him. Only Fuentes was sitting in the back seat.

Before the shots were fired, when the Lexus first passed Perez's group, Guzman saw Fuentes's face in the rear passenger-side window. Fuentes stared at Guzman with an angry look. Guzman expected trouble and pointed the car out to Perez. Subsequently, Perez heard the shots and turned to see Arredondo on the ground bleeding. Guzman was also hit. Perez drew a gun from his waistband, ran into Ming Avenue, and fired at the departing car.

Arredondo was shot once in the back. The bullet fractured two vertebrae, lacerated the aorta, pierced several loops of the small intestine, and exited his abdomen. He died that night at a hospital. Guzman was shot once through the left shoulder. A second bullet grazed his right cheek.

The district attorney filed a nine-count information. Counts one through five and count nine related to the shooting on June 24, 2006. Count one alleged willful, deliberate, and premeditated murder of Arredondo. (Penal Code, § 187.)[1] Counts two, three, and four alleged attempted murder of Guzman, Perez, and Calderon. (§§ 187, 664.) Count five alleged firing a gun from a car at persons outside the car. (§ 12034, subd. (c).) Count nine alleged that the June 24 shooting constituted participation in a criminal street gang within the meaning of section 186.22, subdivision (a). Counts one through five each included four enhancement allegations (for a total of 20 of these allegations) stating that Fuentes personally and intentionally fired a gun, causing great bodily injury or death. (§ 12022.53, subd. (d).) Counts one through five also each included enhancement allegations stating that Fuentes committed the crimes for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) Counts one through four and count nine included enhancement allegations that Fuentes personally used a gun. (§ 12022.5, subd. (a).) (With respect to counts one through four, these allegations were later withdrawn.) Count one included two enhancement allegations that carried a term of life without the

[1]Subsequent statutory references are to the Penal Code.

possibility of parole: that the murder of Arredondo was intentional and was done by means of firing a gun from a car intentionally at a person outside the car with intent to kill (§ 190.2, subd. (a)(21)); and that the murder was intentional, was done while Fuentes was an active participant in a criminal street gang, and was carried out to further the gang's activities (§ 190.2, subd. (a)(22)). Counts two, five, and nine included enhancement allegations that Fuentes personally inflicted great bodily injury on Guzman. (§ 12022.7.)

Counts six, seven, and eight related to the shooting on June 14, 2006. Count six alleged firing a gun at an inhabited house. (§ 246.) Count seven alleged firing a gun from a car at a person outside the car. (§ 12034, subd. (c).) Count eight alleged assault with a semiautomatic firearm. (§ 245, subd. (b).) Each of these counts included an enhancement allegation that Fuentes committed the crimes for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) Count eight included an enhancement allegation that Fuentes personally used a gun. (§ 12022.5, subd. (a).)

At trial, the key prosecution testimony came from Fuentes's accomplice Fabian Lopez, a passenger in the Lexus, who received reduced charges in exchange for his testimony and his guilty plea. Lopez identified Fuentes as the shooter in the drive-by on June 24, 2006. Perez, though at first disclaiming any knowledge, testified after his recorded police statement was played for the jury that Fuentes was the shooter in the June 14, 2006, drive-by. Under further questioning, Perez equivocated about how sure he was in his identification.

Fuentes testified in his own defense. He denied participating in either shooting. He said he was at his father's and his girlfriend's houses at the relevant times on June 14 and 24, 2006. Defense counsel focused in his closing argument on a variety of conflicts in the evidence, including Perez's equivocations and some statements that there were more than three people in the Lexus. Counsel also discussed a shell casing that did not come from either of the two guns involved, and cell phone records suggesting Fuentes

and Lopez were in separate locations at a time close to the time of the second shooting, when the prosecution's theory placed them in the Lexus together.

The jury found Fuentes guilty as charged. The court imposed sentence as follows: for count one, murder as enhanced, life in prison without the possibility of parole, plus a consecutive enhancement pursuant to section 12022.53, subdivision (d), of 25 years to life; for count two, attempted murder, a consecutive upper term of nine years, a consecutive enhancement pursuant to section 186.22, subdivision (b)(1), of 10 years, and a consecutive enhancement pursuant to section 12022.53, subdivision (d), of 25 years to life; for counts three and four, attempted murder, consecutive terms of two years four months each, equal to one-third of the middle term, plus consecutive enhancements of three years four months each pursuant to section 186.22, subdivision (b)(1), plus 25 years to life each pursuant to section 12022.53, subdivision (d); and for count six, shooting at an inhabited dwelling as enhanced, 15 years to life. Sentences for counts five, seven, eight, and nine were stayed pursuant to section 654. The total sentence was life without parole plus 115 years to life plus 30 years four months.

DISCUSSION

Fuentes's first three arguments concern allegedly erroneous jury instructions. A trial court in a criminal case is required—with or without a request—to give correct jury instructions on the general principles of law relevant to issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) The court has no duty to give an instruction if it is repetitious of another instruction the court gives. (*People v. Turner* (1994) 8 Cal.4th 137, 203, overruled on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) """[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."""" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Instructional error warrants reversal only if there is a reasonable probability that the defendant would have obtained a more favorable outcome without the error. (*People v.*

Breverman (1998) 19 Cal.4th 142, 178.) An appellate court can address an incorrect instruction to which no objection was made at trial if the instruction impaired the defendant's substantial rights. (§ 1259.) Although Fuentes did not object to the instructions at trial, we will address the merits of each of the instructional issues he now raises.

I. Murder instructions

Fuentes argues that the trial court erred when it instructed the jury that it could find him guilty of count one based on a theory of first degree felony murder, with shooting from a car as the underlying felony. Since that offense is not an enumerated felony within California's first degree felony-murder rule, we agree that it was error to give a first degree felony-murder instruction in this case. The error was harmless, however, because the jury, applying other instructions, necessarily found all the elements of a first degree drive-by murder as defined in section 189.

In accordance with CALCRIM Nos. 548 and 540A, the court gave the jury the following instructions on felony murder:

> "The defendant has been prosecuted for murder under two theories: One, malice aforethought and, two, felony murder.
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> "Each theory of murder has different requirements, and I will instruct you on both. You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory. [¶] … [¶]
>
> "The defendant is charged in Count 1 with murder under a theory of felony murder. To prove that the defendant is guilty of first-degree murder under this theory, the People must prove that, one, the defendant committed the crime of intentionally discharging a firearm from a motor vehicle; two, the defendant intended to commit the crime of intentionally discharging a firearm from a motor vehicle; and three, while committing the crime of intentionally discharging a firearm from a motor vehicle the defendant did an act that caused the death of another person.

> "A person may be guilty of felony murder even if the killing was unintentional, accidental or negligent. To decide whether the defendant committed the crime of intentionally discharging a firearm from a motor vehicle, please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first-degree murder under a theory of felony murder.
>
> "The defendant must have intended to commit the felony of intentionally discharging a firearm from a motor vehicle before or at the time of the act causing the death. It is not required that the person die immediately as long as the act causing the death and the felony or felonies are part of one continuous transaction.
>
> "It is not required that the person killed be the victim or intended victim of the felony."

There is no doubt that these instructions were erroneous. As this court held in *People v. Chavez* (2004) 118 Cal.App.4th 379, 385-387 (*Chavez*), discharging a firearm from a motor vehicle is not among the felonies upon which a conviction for first degree felony murder can be based. This rule is stated, with a citation of *Chavez*, in the bench notes to CALCRIM No. 540A. The reason for the rule is that section 189, in which first degree felony murder and drive-by first degree murder are both defined, states expressly that first degree drive-by murder requires an intent to kill. An intent to kill is not an element of felony murder. (*Chavez, supra*, 118 Cal.App.4th at pp. 385-386.) The felony-murder instructions here told the jury it could find Fuentes guilty of first degree drive-by murder even if the killing was "unintentional." This was incorrect.

It is true that the court also gave a correct instruction, in accordance with CALCRIM No. 521, on the elements of first degree drive-by murder, including the intent-to-kill element. This only means, however, that the jury was given two instructions that flatly contradicted each other and no guidance regarding which of the two it should follow.

In spite of this, we can say with certainty that the jury did find the necessary intent to kill and the other elements of first degree drive-by murder. This is because the jury

made an affirmative finding under CALCRIM No. 735, the instruction for the drive-by murder special circumstance set forth in section 190.2, subdivision (a)(21). That instruction stated:

> "The defendant is charged with a special circumstance of committing murder by shooting a firearm from a motor vehicle. To prove that this special circumstance is true, the People must prove that, one, the defendant shot a firearm from a motor vehicle, killing Jesus Arredondo; two, the defendant intentionally shot at a person who was outside the vehicle; and, three, at the time of the shooting the defendant intended to kill."

The elements of this special circumstance are the same as the elements of first degree drive-by murder: "[A]ny murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree." (§ 189.) The jury expressly found this special circumstance true on a separate page of the verdict form. The finding included the elements that "the murder was intentional" and that Fuentes fired the gun "with the intent to inflict death."

Under an additional instruction, the jury found for a second time that Fuentes intended to kill Arredondo. The instruction for the gang-participation special circumstance set forth in section 190.2, subdivision (a)(22), stated that, to prove this circumstance, the People must prove, among other things, that "the defendant intentionally killed Jesus Arredondo." The jury found the section 190.2, subdivision (a)(22), special circumstance true. The verdict form included the jury's finding "that the murder was intentional."

The situation was similar in *Chavez*. The court instructed the jury that it could find first degree drive-by murder on a theory of felony murder, with no requirement that it find an intent to kill. (*Chavez*, *supra*, 118 Cal.App.4th at pp. 384, 387.) This was erroneous, but the jury also applied a correct drive-by-murder special-circumstance instruction and found that the defendant had an intent to kill when shooting from a car at the victim. (*Id.* at pp. 382, 388). For this reason among others, the error was harmless beyond a

reasonable doubt. (*Id.* at p. 390.) The beyond-a-reasonable-doubt standard of harmless-error review applied because the omission of an element of an offense was implicated by the instructional error. (*Id.* at p. 387.)

In light of the jury's findings that the drive-by and gang-participation special circumstances (with their intent-to-kill requirements) were true, we conclude there is no chance the jury would have reached a different verdict absent the error here. The error is harmless beyond a reasonable doubt.

In attempting to show that the erroneous murder instruction was prejudicial, Fuentes argues that the court gave inadequate instructions on aiding and abetting. Although the instructions stated that an aider and abettor must share the perpetrator's intent to commit the crime, he argues, they did not specify that to be guilty of murder as an aider and abettor, Fuentes must have shared the shooter's intent to kill. Fuentes contends that this is important because the jury asked questions about the aiding-and-abetting instructions.

This argument does not help Fuentes. As we have said, the jury's finding on the drive-by special circumstance leaves no doubt that the jury found Fuentes had the intent to kill. Further, the jury found true the enhancement allegations that Fuentes personally and intentionally fired a gun, causing great bodily injury or death, so there is no doubt that it found him guilty as the shooter, not as an aider or abettor.

II. "Kill zone" instruction

For the three counts of attempted murder, the court gave jury instructions on the "kill zone" theory. This is the theory that a defendant who was trying to murder a particular individual meant to do it by killing everyone in a targeted area containing that individual among others, and therefore can be guilty of attempted murder of the others. The theory is based on the idea that a defendant had a specific intent to kill—the intent necessary for a conviction of attempted murder—all the people in the area. (*People v. Bland* (2002) 28 Cal.4th 313, 329-331 (*Bland*).)

"[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within … the 'kill zone.' 'The intent is concurrent … when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death.'" (*Bland*, *supra*, 28 Cal.4th at pp. 329-330, quoting *Ford v. State* (Md. 1993) 625 A.2d 984, 1000-1001.)

The court instructed the jury on attempted murder in accordance with former CALCRIM No. 600.[2] The instruction included these statements:

"A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of [harm] or kill zone.

"In order to convict the defendant of the attempted murder of Jose Guzman, Margarito Perez or Jaime Calderon, the People must prove that the defendant not only intended to kill Margarito Perez but also intended to kill Jose Guzman, Margarito Perez or Jaime Calderon or intended to kill anyone within the kill zone.

"If you have a reasonable doubt whether the defendant intended to kill Jose Guzman, Margarito Perez, Jaime Calderon or intended to kill Margarito Perez by harming anyone in the kill zone, then you must find the

[2]CALCRIM No. 600 was revised in December 2008.

defendant not guilty of the attempted murder of Jose Guzman, Margarito Perez and Jaime Calderon."

Fuentes contends that the reference to an intent to kill by "harming anyone in the kill zone," rather than by killing everyone in the kill zone, was erroneous.[3] We agree. While the *Bland* court's quotation of the Maryland Court of Appeals' opinion in *Ford* included a similar equivocation between an intent to kill people in the zone and an intent to harm them, the real meaning of the kill-zone doctrine must be that the defendant has a specific intent to kill everyone in the zone. Our Supreme Court made it clear in *Bland* that a conviction of attempted murder requires a finding that the defendant had a specific intent to kill the victim of the attempt; no transferred intent is legally possible and no state of mind short of an intent to kill—such as implied malice—is sufficient. (*Bland, supra*, 28 Cal.4th at pp. 326-329.) The point of the kill-zone theory is that deadly force directed at a group of people with the primary goal of killing one of them can still be a basis of convictions of attempting to murder the others if the defendant intended to kill each of them as well. There is no likelihood that the Supreme Court meant an intent merely to harm the others would suffice to support convictions of attempting to murder them.[4]

The error is harmless beyond a reasonable doubt, however.[5] Despite the flaw Fuentes points to, the instruction repeatedly stated that the jury must find an intent to kill

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[3]According to the reporter's transcript, the court said "harming anyone in the kill zone." The clerk's transcript shows that the printed instruction read "harming everyone in the kill zone." The pattern instruction reads "harming everyone in the kill zone."

[4]On June 25, 2008, the California Supreme Court granted review in a case from our court presenting a similar issue, *People v. Stone* (2008) 160 Cal.App.4th 937. That case involved a modified version of former CALCRIM No. 600, not, as here, an instruction following the former pattern instruction.

[5]Since it is contended that the instruction failed to communicate the intent-to-kill element of the offense, we will assume without deciding that harmlessness beyond a reasonable doubt, rather than the mere absence of a reasonable probability of a better outcome for the defendant absent the error, is the applicable standard.

Guzman, Perez, and Calderon or an intent to kill anyone in the kill zone.[6] Further, the instructions included a generic attempted-murder instruction in addition to the kill-zone instruction, which also set out the requirement that an attempted murderer must intend to kill the victim:

> "To prove the defendant is guilty of attempted murder the People must prove that, one, the defendant took at least one direct but ineffective step towards killing another person; two, the defendant intended to kill that person."

In light of this, there is no likelihood the defective language caused the jurors to think only an intent to harm the victims was necessary. It is also significant that the evidence

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[6]An issue discussed in *People v. Stone, supra,* 160 Cal.App.4th 937, but not raised by Fuentes, is whether CALCRIM No. 600 is erroneous because it refers to an intent to kill "anyone" in the kill zone when the required intent is an intent to kill *everyone* in the zone. The revised pattern instruction still contains references to an intent to kill "anyone" in the kill zone. We will not address the question of error on this point, for we are satisfied that any error was harmless. The use of "anyone in the zone" may be ambiguous, for it could mean either "whoever is in the zone," i.e., all the people in the zone, or "someone in the zone," i.e., at least one person in the zone. The latter interpretation would misstate the kill-zone doctrine, since an intent to kill one person in the zone would not support a conviction of attempted murder of another person in the zone. An ambiguous instruction is reversible error only if there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 963; *People v. Hernandez* (2003) 111 Cal.App.4th 582, 589.) In light of the evidence and the other instructions, we conclude there is no reasonable likelihood that the jury failed to understand it had to find that Fuentes intended to kill each victim of attempted murder.

The Court of Appeal also considered the anyone/everyone problem in CALCRIM No. 600 in *People v. Campos* (2007) 156 Cal.App.4th 1228. It held that the pattern instruction's wording was not erroneous because, among other reasons, "[a] defendant who shoots into a crowd of people with the desire to kill anyone he happens to hit, but not everyone, surely has the specific intent to kill whomever he hits …." (*Id.* at p. 1243.)

The older pattern instruction on the kill-zone theory, CALJIC No. 8.66.1, has neither the harm/kill problem nor the anyone/everyone problem. It says the necessary intent is established when "it is reasonable to infer the perpetrator intended to kill the victim by killing everyone in that victim's vicinity."

that Fuentes fired many times into a zone occupied by a rival gang member and his companions, hitting two of them and killing one, makes this a typical kill-zone case; the inference that Fuentes intended to kill all four victims was compelling. We are confident beyond a reasonable doubt that the jury would not have reached a different verdict absent the mistake in the instruction.

In *People v. Bragg* (2008) 161 Cal.App.4th 1385, as in this case, the Court of Appeal considered the argument that the reference to an intent to harm in former CALCRIM No. 600 was erroneous. (*People v. Bragg, supra,* at p. 1395.) It concluded there was no error because "[n]o reasonable juror could have failed to understand from the instructions as a whole that … the harm to which the court referred was the ultimate harm of death …." (*Id.* at p. 1396.) We similarly conclude that the jury could not reasonably have failed to understand the intent-to-kill requirement. Unlike the *Bragg* court, however, we describe this as harmless error, rather than no error. The challenged portion of the instruction refers to the required intent as an intent to harm, and this is an incorrect statement of the law.

III. Motive and criminal street gang participation

In accordance with CALCRIM No. 370, the court instructed the jury as follows regarding motive:

> "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may however consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

Fuentes argues that this instruction conflicted with the instructions for the substantive offense of criminal street gang participation and the sentence-enhancement and special-circumstance provisions related to criminal street gangs and lessened the prosecution's burden of proof on those issues. The instruction for the substantive offense (§ 186.22, subd. (a)) stated:

> "To prove that the defendant is guilty of this crime, the People must prove that, one, the [d]efendant actively participated in a criminal street gang; two, when the defendant participated in the gang he knew that members of the gang engaged in or have engaged in a pattern of criminal gang activity; and, third, the defendant willfully assisted[,] further[ed or] promoted felonious criminal conduct by members of the gang."

The instruction for the section 190.2, subdivision (a)(22), special circumstance required a finding that "the murder was carried out to further the activity of the criminal street gang." The instruction for the section 186.22, subdivision (b), enhancement required a finding that "the defendant intended to assist, further or promote … criminal conduct by gang members." Fuentes argues that, although each of these instructions required a finding that he had an intent to further gang activity, the motive instruction contradicted this, telling the jury it did not have to make that finding. We disagree.

An intent to further criminal gang activity is no more a "motive" in legal terms than is any other specific intent. We do not call a premeditated murderer's intent to kill a "motive," though his action is motivated by a desire to cause the victim's death. Combined, the instructions here told the jury the prosecution must prove that Fuentes intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it. Fuentes claims the intent to further criminal gang activity should be deemed a motive, but he cites no authority for this position. There was no error.

If Fuentes's argument has a superficial attractiveness, it is because of the common-sense concept of a motive. Any reason for doing something can rightly be called a motive in common language, including—but not limited to—reasons that stand behind other reasons. For example, we could say that when A shot B, A was motivated by a wish to kill B, which in turn was motivated by a desire to receive an inheritance, which in turn was motivated by a plan to pay off a debt, which in turn was motivated by a plan to avoid the wrath of a creditor. That is why there is some plausibility in saying the intent to further gang activity is a motive for committing a murder: A wish to kill the victim was a

reason for the shooting, and a wish to further gang activity stood behind that reason. The jury instructions given here, however, were well adapted to cope with the situation. By listing the various "intents" the prosecution was required to prove (the intent to kill, the intent to further gang activity), while also saying the prosecution did not have to prove a motive, the instructions told the jury where to cut off the chain of reasons. This was done without saying anything that would confuse a reasonable juror.

People v. Maurer (1995) 32 Cal.App.4th 1121, 1126-1127, on which Fuentes relies, does not conflict with what we have said. *Maurer* held that the standard motive instruction was erroneous when given in conjunction with an instruction on section 647.6, which prescribes punishment for "[e]very person who, motivated by an unnatural or abnormal sexual interest in children, engages in conduct with an adult whom he or she believes to be a child" where the conduct would be an offense if the other person really were a child. Since this offense includes a "motivation" as one of its elements, a jury naturally would be confused by an instruction saying the prosecution need not prove the defendant's motive. Due to this peculiarity in the definition of the offense (the *Maurer* court called the section "a strange beast" (*People v. Maurer, supra*, 32 Cal.App.4th at p. 1126)), the combination of instructions could not successfully tell the jury where to cut off the chain of reasons for the defendant's action which the prosecution had to prove. If section 647.6 referred to, say, persons acting "with an intent to gratify an unnatural or abnormal sexual interest in children" instead of a motivation, the standard motive instruction would have been no more problematic than it is here.

IV. Life without parole and the Eighth Amendment

Fuentes argues that the drive-by special circumstance set out in section 190.2, subdivision (a)(21), violates the Eighth Amendment as applied in this case because it resulted in a sentence of life without parole based on the same facts that made the murder a first degree murder. This argument is based on case law holding that death penalty laws must provide objective standards to narrow the class of murders to which the death

penalty is applicable. (*Zant v. Stephens* (1983) 462 U.S. 862, 876; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465.) Fuentes interprets this case law as implying that, where one statute defines a type of offense as first degree murder, which in California can lead to a sentence of death, life without parole, or 25 years to life (§ 190, subd. (a)), another statute mandating life without parole as a minimum sentence must define a narrower class of offenses than the first statute. In other words, he says it is unconstitutional if an entire defined subclass of first degree murders, such as drive-by murders, has a minimum sentence of life without parole.

This argument is weak, as the class of drive-by murders defined as first degree murders by section 189 is already a narrow class defined by objective standards. Nothing in the case law suggests that it is unconstitutional for a narrowly defined subclass of murders subject to life without parole to coincide with a narrowly defined subclass of first degree murders.

Fuentes acknowledges that we are precluded from embracing his view by California Supreme Court cases upholding various statutory special circumstances over Eighth Amendment challenges relating to assertedly insufficient narrowness. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1195 ["This court has consistently rejected the claim that the statutory special circumstances … do not adequately narrow the class of persons subject to the death penalty"]; *People v. Catlin* (2001) 26 Cal.4th 81, 158 ["First degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth Amendment"].) He also observes that the Second District Court of Appeal has rejected an Eighth Amendment challenge to the section 190.2, subdivision (a)(21), special circumstance in particular. (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 164, 173-174.) He makes the argument only to preserve it for later review. We conclude there is no error.

V. Blakely and Cunningham and upper and consecutive terms

Fuentes's sentence included an upper term and a number of consecutive sentences. He claims these parts of the sentence contravene *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) because the decisions to impose them were not supported by facts admitted by him or found by the jury.

Blakely and *Cunningham* are inapplicable to the upper term imposed in this case because, as Fuentes acknowledges, he was sentenced after the effective date of the statute known as Senate Bill No. 40 (Stats. 2007, ch. 3), which amended California's determinate sentencing law (§ 1170) to comply with *Blakely* and *Cunningham*. Under the new statute, there is no presumption in favor of the middle term, and sentencing judges may impose whichever term "in the court's discretion, best serves the interests of justice," without making factual findings (though they must still supply reasons). (§ 1170, subd. (b).) This change was designed to meet the requirement, set forth in *Blakely* and applied to California in *Cunningham*, that if, under state law, a sentence can be imposed only after a factual finding, the finding must be made by the jury or admitted by the defendant, or must be the fact of a prior conviction. (*Blakely, supra,* 542 U.S. at pp. 303-304; *Cunningham, supra,* 549 U.S. at pp. 274, 293.) Senate Bill No. 40 eliminated the *Blakely/Cunningham* problem for upper terms by eliminating the requirement of factual findings as a basis for an upper term.

Fuentes's brief contains a section heading asserting that Senate Bill No. 40 is unconstitutional, but the discussion under this heading does not contain a clear explanation of why it would be unconstitutional. Fuentes says:

> "But while the intent of Senate Bill No. 40 may have been to expose defendants to upper term sentences in the discretion of the trial court, the reality is that even though a sentencing court now bases its discretion on purported 'reasons' rather than 'facts,' the amendment to section 1170 now allows those courts to impose upper terms without any further factual findings that satisfy the governing Sixth Amendment authorities."

As we have said, the purpose of Senate Bill No. 40 was to eliminate the requirement that factual findings be made in the first place, making the *Blakely/Cunningham* objection—that necessary facts were not found by the jury or admitted by the defendant—inapplicable. Fuentes does not supply any reasons why the new law fails to achieve this objective.

Fuentes also claims the fact that defendants are now sentenced under the revised sentencing law, while previously being sentenced under the former sentencing law, constitutes a violation of the equal protection clause of the Fourteenth Amendment. He offers no analysis in support of this argument and cites no authority. Since it has not been sufficiently argued in Fuentes's briefs, we decline to consider this claim. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

Apart from this equal-protection issue, Fuentes does not claim he should have been sentenced under the former law. This type of claim would have been unsuccessful. In *People v. Sandoval* (2007) 41 Cal.4th 825, the Supreme Court held that, in cases in which upper term sentences are reversed under *Blakely* and *Cunningham*, resentencing proceedings "are to be conducted in a manner consistent with the amendments to [the determinate sentencing law] adopted by the Legislature," even though the offense and original sentencing took place before the amendments became effective. (*People v. Sandoval*, *supra*, at p. 846.) It follows that original sentencing proceedings taking place after the effective date of the amendments for crimes occurring before that date, as in this case, also must conform to the new law.

On the issue of consecutive sentences, Fuentes's position has been rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, 1263 (*Black I*). The court reaffirmed this conclusion in *People v. Black* (2007) 41 Cal.4th 799, 821 (*Black II*), stating that it was not undermined by *Cunningham*. Further, after the parties' briefs were filed in this case, the United States Supreme Court held in *Oregon v. Ice* (2008) ___ U.S.

___, ___ [129 S.Ct. 711, 715-716], that the requirements of *Blakely* do to apply to findings used to impose consecutive sentences. There was no error in the imposition of consecutive sentences here.

Fuentes acknowledges that we are bound by applicable authority to reject his arguments based on *Blakely* and *Cunningham*. He presents these arguments to preserve them for later review. We conclude there is no error.

DISPOSITION

The judgment is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

_____
Dawson, J.

_____
Kane, J.